

July 8, 2014

Via Email

Mr. James W. Sallans
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Re: Farmers Branch Creek – Addison Amended Water Use Permit

Jim:

Thank you and Catie for meeting with us to discuss concerns of the City of Farmers Branch and of its residents regarding the Town of Addison's construction and operation of reservoirs associated with its Vitruvian Park development and, in particular, with its failure to comply with amended Water Use Permit No. 5383A, issued to it on May 20, 2011, and with the ramifications of that noncompliance on them and on the physical and ecological wellbeing of Farmers Branch Creek. Thank you too for following up and speaking with Addison's counsel, John Hill, about those concerns. We understand that Addison's consultant, KBA EnviroScience, Ltd., will be presenting the attached report to Addison's town council at its regularly scheduled meeting today and that the conclusions in that report represent the Town's position. See the attached Addison staff presentation. Although our strong preference has been to work cooperatively with Addison, the bottom line is that Addison is in clear violation of its amended permit, which it refuses to acknowledge, and should be required to enter into an administrative order leading to compliance. Rather than responding point by point to the KBA Report, we point out deficiencies that are matters of law that do not require technical expertise to evaluate. We do flag some of the technical issues, but leave the discussion of them to another time. To encourage dialog, we are copying Addison's counsel and city manager as well as the offices of Representatives Anchia and Ratliff, both of whom have expressed interest in this matter.

Addison commissioned the KBA Report to respond to the technical report that TRC had prepared for Farmers Branch, a copy of which we provided the agency in accordance with the resolution adopted by the City on May 20, 2014. As we discussed, we think both municipalities would have benefitted by having their consultants discuss these issues first, but Addison declined our offer to do so, perhaps based on KBA's assurance, contained in its report, that: "Based on our review, no further action is required by the Town to meet the requirements of its TCEQ permit." As we discussed, we believe some issues are of a more technical nature, but others present questions of law, the resolution of which we believe is quite straight forward.

For example, as a matter of law, by completing its well in the Woodbine Aquifer, Addison is in violation of Special Condition 6. B. of the Permit. This provision requires that Addison "maintain and operate an alternate source of water with sufficient production to ensure no State water is used as a result of this amendment." That provision goes on to state that Addison "has identified groundwater from the Trinity Aquifer as the alternate source of water for this project." Special Condition 6.C. expressly provides that: "This amendment is contingent upon the Permittee's maintenance of the alternate source of water identified in Special Condition B. [that is, the Trinity Aquifer]." It then specifies the remedy "[i]n the event the groundwater well will not be used as the alternate source," that is: "Permittee shall immediately cease impoundment of water under this amendment and either apply to amend this permit with documentation of the new alternate source of water, or voluntarily forfeit the amendment."

Issuance of the Permit was based on the representation that the Trinity would be "the alternate source of water," and that representation not only was relied upon by both the agency and the City in their review of the application, it was expressly incorporated into the amended permit. Addison maintains that a July 5, 2012 letter Kleinfelder Central, Inc., Addison's contractor, sent to it and a February 7, 2013 letter the Town sent to the TCEQ somehow authorized the use of the Woodbine instead of the Trinity. The rules of the TCEQ and the permit itself provide otherwise: regardless of whether a TCEQ staff person said it was OK, the only way for Addison legally to use a different aquifer is to go through the formal permit amendment process, with notice and the opportunity for comment and hearing. Permits may not be amended by a permittee notifying the agency of a deviation nor by an agency staffer saying the deviation is OK. (Despite repeated requests, Addison has never supplied documentation that an OK was provided). Addison's claim that it was not required to go through the amendment process to change aquifers has no legal support, and Addison offers none.

As a technical matter, there was a reason for requiring that the Trinity be used, because its quality though not equivalent to surface water quality was close (based on one sample, 641 mg/L TDS as compared to the water quality standard of 500 mg/L) and the creek's water quality could be maintained by mixing. KBA suggests two sample results establish that the quality of Farmers Branch Creek, the maintenance of which is independently required by Special Condition 6. E., is not adversely affected by use of water from the Woodbine. Leaving aside for the moment whether those sample results were representative of the water quality of Farmers Branch (we do

not believe they were), there is nothing in the KBA report that refutes TRC's conclusion regarding the relatively poor quality of the water in the Woodbine, including, for example, the fact that the Woodbine has total dissolved solids (TDS) 4 to 5 times higher than the water quality standard, that is, 2000 to 2400 mg/L--another reason why the permit specified the acceptable alternate source. The high TDS (as well as chloride and sulfate) levels of the Woodbine also raise an issue whether Addison, as a matter of law, would have been required not only to amend its water use permit, but also to obtain a separate water quality permit to discharge water pumped from it.

As a matter of law, Addison also is mistaken in its position that it must discharge only a minimum of 5.82 acre-feet per year. The Permit clearly states that that amount is a minimum; the question is how much above that minimum Addison must discharge. The answer is found in Special Conditions 6. A. and B., specifically:

"6. A. This amendment does not allow Permittee to impound State water in Reservoir No. 2 or additional State water in reservoir No. 1. Permittee shall provide and maintain suitable outlets in good working condition in the reservoirs to pass all inflows of State water downstream and maintain the reservoirs full..." (Emphasis added).

"6. B. Permittee shall maintain and operate an alternate source of water with sufficient production to ensure no State water is used as a result of this amendment ...To account for potential use of State water due to evaporation, Permittee shall supplement the reservoirs with water from the groundwater well in the amount of a minimum of 5.82 acre-feet per year..." (Emphases added).

For the interim, we request that Addison either continue the discharge of adequate flows of water from its existing well until a replacement well is completed into the Trinity or, in the alternative, that it comply with Special Condition 6.C. and cease impoundment of water.

As a matter of law too, Addison, to the extent KBA speaks on its behalf, is mistaken in its position that there is no "periodicity" requirement in the Permit. As noted, Special Condition 6. A. requires that Addison "pass along all inflows of State water..." Under the permit, Addison may not take State water at any time; the burden is on it to establish that it is not taking State water at any time. Taken to its extreme, Addison seems to be suggesting that it can hold State water for 364 days and then release 5.82 + acre-feet on the 365th day and be in compliance. Such an interpretation is not only inconsistent with the letter and spirit of the Permit, it would have significant adverse consequences for the downstream users, adjacent homeowners, and the stream's ecology, another reason why its interpretation is incorrect as a matter of law. In its report, TRC suggests a methodology for Addison to assure continued compliance with the mandate that no State water be used as a result of this amendment. We urge Addison to consider adopting it.

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As noted, there are numerous other issues raised by the KBA Report or that the report does not address. Had Addison taken us up on the offer, we could have discussed them in more detail with them. Perhaps we can discuss them at some future time. These issues include: the fact that Farmers Branch is a perennial rather than an intermittent creek (based on, among other things, letters of 30+ year residents along the creek to the effect that it never went dry until Addison began construction and the fact that there is a well-documented upstream continual groundwater discharge from a fracture in the limestone); Addison's failure to comply with Special Condition 6. D., maintenance of a riparian buffer (Addison's development and grass go right up to the creek); how evaporation rates are to be measured and accounted for, including what the pertinent surface area is; whether Addison's construction was unauthorized; whether rainfall that entered the creek was State water; whether State water was unlawfully impounded during construction; the quality of the water pumped from the Woodbine and its impact on the creek's water quality; and whether Addison has made adequate provision for redundancy and backup of pumps.

As we discussed, Farmers Branch is willing to work cooperatively with Addison to resolve these issues, but Addison apparently does not believe any such issues exist. As discussed above and in the TRC report, we believe Addison is wrong and request that the agency assist us and our residents, who are adversely affected by Addison's course of conduct, in having them come into compliance.

Jeff Civins

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